RE: Rule Numbering System
8/27-28/04 Commission Meeting
Open Session Item III.G.
Supplemental Mailing

-----Original Message-----
From: Kevin Mohr [mailto:kemohr@comcast.net]
Sent: Tuesday, August 10, 2004 10:17 AM
To: Difuntorum, Randall
Cc: McCurdy, Lauren; Kevin Mohr; Kevin Mohr; Kevin Mohr; Karen Betzner; Harry Sondheim (E-mail)
Subject: RRC - Rule Number - Supplemental Materials - 08/27 & 08/28/04 Meeting - Agenda Item

Greetings Randy & Lauren:

As we discussed briefly last week, I've attached summaries of the Kutak Commission report on rule format (which the ABA folks provided us), and the other materials we have on rule format/numbering: Creamer and Simon articles, and Oregon Rules Committee Report.

I've also attached a clean copy of the Kutak Commission Report (scanned; cleaner than the fax), and copies of the Creamer and Simon articles, as well as the Oregon Report. All documents are in Word.

All I've done is summarize them to assist the Commissioners in their preparation for the meeting discussion.

Some Comments:

1. I can't add much to those articles except perhaps to note that the current Code states (Iowa, Nebraska, New York, Ohio and Oregon) all appear to be moving inexorably to a Model Rule format (Iowa and Oregon have already submitted reports and the move is under serious consideration in the other states). Maine appears to be holding fast with its unique Code format that is based on the language of the ABA Code's Disciplinary Rules but is organized in a substantially different way, without the Canons or Ethical Considerations (which is another way of saying in this area, California is not uniquely unique).

2. I can note that California already has a "restatement" approach, i.e., a black letter rule and comments (Discussion), so much of the substance of the Kutak Commission's 8/1982 report on rules format is more of historical interest (though the concerns raised in that report about use of Canons and Ethical Considerations as a basis for discipline might also be applied to concerns about a similar use of Discussion paragraphs to impose discipline).

3. I have not been in contact with Karen or tried to address the more substantive issue of which format -- ABA or California -- better reflects the practice of law or how ethics issues might arise, and therefore would be best positioned to enable a lawyer to quickly find a resolution to his or her identified ethical concern. There are some similarities. For example, both the ABA and California devote a chapter to Client-Lawyer relationship (MR's Ch. 1 and Cal's Ch. 3), and those chapters include some of the same rules (e.g., Competence, Communication, Conflicts, Confidentiality), but while the ABA will also include in that chapter "Fees" (MR 1.5), "Safekeeping Property" (1.15) and "Sale of Law Practice" (1.17), Cal. spreads its analogous rules in other chapters: Fees (4-200); Client Funds (4-100), Sale of Law Practice (2-300).

4. Two of the ABA Chapters are devoted to different functions of the lawyer (set out in Preamble, ¶.[2]): Chapter 2 - Counselor and Chapter 3 - Advocate. California also has a chapter devote to Advocacy -- Chapter 5, which has many of the same rules as in the Model Rule's Chapter 3. California does not, however, have a chapter devoted to "Counselor" functions (i.e., Advisor, Evaluator) similar to MR chapter 2, but the RRC at the 7/9/04 Meeting adopted a tentative draft of a rule that largely tracks MR 2.4 (proposed rule 1-720).

5. The ABA has a separate chapter devoted to "Information About Legal Services" (the "7 series" on advertising & solicitation), while California has had rule 1-400 (in its first chapter on "Professional Integrity In General"). The RRC, however, adopted at the 7/9/04 Meeting black letter advertising & solicitation rules based on the ABA rules template.

6. Chapter 1 of the Cal. Rules is titled "Professional Integrity in General". The Model Rules have Chapter 8, "Maintaining the Integrity of the Profession." Note that the MR Preamble, ¶. [1] states that "[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." The California chapter includes the following rules. I've parenthetically noted where the analogous MR can be found.

1-100. Rules of Professional Conduct, in General (see Preamble, MR 8.5 re jurisdiction & choice of law)
1-110. Disciplinary Authority of State Bar (MR 8.5)
1-120. Assisting, Soliciting or Inducing Violations (MR 8.4) -- Consider also tentative draft of rule 1-120X.
1-200. False Statement re Admission to the Bar (MR 8.1)
1-300. UPL (MR 5.5) -- Note that Chapter 5 of the MR's is devoted to "Law Firms and Associations". Note also MR 5.5's MJP provisions; cf. California Rules of Court 964-967, and proposed bar rules currently out for public comment.
1-400. Advertising & Solicitation (MR 7.1 to 7.6)
1-500. Agreements Restricting a Member's Practice (MR 5.6).
1-600. Legal Services Programs (no analog in MR's)
1-700. Member as Candidate for Judicial Office (no analog in MR's)
1-710. Member as Temporary Judge, etc. (see, e.g., MR 2.4; see also MR 1.12).

7. The ABA also has chapters on "Transactions with Persons Other Than Clients" (Chap. 4), "Law Firms and Associations" (Chap. 5), Public Service (Chap. 6)

8. After going through the foregoing exercise, I'm still not sure which code's organization better reflects the practice of law or "the real world," and would best enable a lawyer who is confronted with an ethical dilemma to quickly and accurately find the information he or she needs to resolve the matter. Perhaps my problem is that I am equally familiar with the California Rules and Model Rules, having taught both in my classes for a dozen years, and do not find either organization to be better in helping me find the relevant rule. The meeting discussion should be interesting.

Kevin

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CalBar – RRC – Rule Numbering
Summary of Kutak Report on Rule Format,
Articles by Prof. Simon & Robert Creamer &
Report of Oregon State Bar
Kevin Mohr
August 9, 2004

SUMMARIES OF VARIOUS ARTICLES & REPORTS CONCERNING RULE FORMAT ISSUES

I. Kutak Report on Model Rule Format (1982)

The Kutak Report's consideration of the rule format focuses on the advantages of an ethics code that is modeled on a Restatement approach, i.e., a black letter rule, with each rule followed by comments that explain the black letter rule. The rules then would be organized into chapters by subject matter.

The Kutak Commission took the position that this approach was better than the format of the ABA Model Code of Professional Responsibility ("ABA Code"), which had a cumbersome organization: Nine "canons" that are based on subject matter, with each canon containing a number of Ethical Considerations, which are intended to be aspirational, and Disciplinary Rules, the violation of which is intended to subject the lawyer to discipline.

The Commission urged the adoption of a Restatement approach for three main reasons:

1. The ABA Code was very difficult to use, often requiring a lawyer to consult with several different Canons, and the Disciplinary Rules and Ethical Considerations therein, to determine the proper course of conduct. This is a disadvantage for lawyers with busy practices.

2. The Restatement approach is familiar to lawyers and would allowed lawyers to readily ascertain which part of a rule was enforceable and which part was intended to provide guidance).

3. Related to 3, courts and disciplinary agencies applying the ABA Code were treating the Canons and Ethical Considerations not as aspirational but as enforceable rules and disciplining lawyers who did not attain the aspirational goals contained in those segments of the ABA Code. Of particular concern to the Kutak Commission was use of the Canons as a standard in discipline proceedings as the Canons were drafted in particularly broad language, and thus lawyers are not given fair warning as to the kinds of conduct for which they might be disciplined. (Page 3, ¶.1) The Commission gives the example of Canon 9's "appearance of impropriety" language that had been converted into a largely

unworkable standard in a broad array of conflicts of interest situations. (Page 4, ¶.1). The Commission was also concerned with the use of the Ethical Considerations as disciplinary standards, as they too were generally intended to be aspirational, though in some instances what are generally considered duties (e.g., communicating significant developments to a client) are phrased aspirationally. (Page 3, ¶.2).

In addition to the foregoing, the Commission noted that the position of the National Organization of Bar Counsel (NOBC) to retain the Ethical Considerations for interpreting the Disciplinary Rules and that lawyers should "should conduct their business well within the tolerances of 'aspirational' goals," pointed up the problem with the Code format that it had identified: "it is inevitable that second and third tier standards will be used interpretatively to expand enforceable rules by hindsight." (Page 5, ¶.1).

II. Simon Article (2004).

Professor Roy Simon of Hofstra, who is a member of the New York State Bar's Committee on Standards of Attorney Conduct ("COSAC") urges New York's adoption of the Model Rules as the template for New York's ethics code. As New York is one of the five remaining states that have an ABA Code format, he uses many of the same arguments as the Kutak Commission used in 1982. He buttresses that argument with the uniformity argument, i.e., adopting the Model Rule format will bring New York in line with the majority of states that have adopted the Model Rules, thereby providing New York with an extended database of case law and disciplinary proceedings that have interpreted and applied the Model Rules.

He also notes the following as advantages to adopting the Model Rules:

1. They are generally easier to use, with a definable black letter law, followed by comments specific to the rule they follow (unlike the ABA Code, where the explanatory Ethical Considerations precede the Disciplinary Rules), often with comments that refer to specific paragraphs within the rule.

2. The Model Rules contain more topics that are found in the ABA Code (e.g., Model Rule 1.18, duties owed prospective clients, etc.)

3. It will avoid conflicts in the ethics rules for New York lawyers with a national practice.

4. New York would have greater influence nationally in the legal ethics field.

Prof. Simon also notes a drawback in adopting the Model Rules: Because New York's approach would be to start with the Model Rules as a template and then customize the rules, they would not attain the uniformity of ethics law that is one of the major reasons for adopting the format. Those familiar with the present New York Code, as well as

those familiar with the Model Rules, would be confronted with an ethics code that is neither. However, Professor Simon notes that that is true already, as the present New York Code is already substantially different in language from the ABA Code.

III. Creamer Article (August 2002)

Robert Creamer of ALAS proposes that all states adopt the Model Rules format and his six "Conventions of Consistency" to enable lawyers to "promptly and safely determine whether and how any particular state ethics rule varies from the corresponding ABA Model Rule. He argues that "a consistent format is appropriate for regulatory schemes with multijurisdictional application." The six "Conventions of Consistency" are:

1. *Use the 2002 Model Rules numbering system for all "black letter" rules and comments*.

2. *If a particular rule, paragraph, or comment of a Model Rule is not adopted, leave that rule, paragraph, or comment blank*. Designate omitted rules, paragraphs, or comments as "reserved." This serves two purposes. First, it tells the lawyers in that jurisdiction and the rest of the world that the jurisdiction decided not to adopt or modify that particular provision of the Model Rules. Second, it eliminates the need to renumber the rules, paragraphs, or comments that follow, a practice that would inevitably cause additional confusion.

3. *Keep the same rule and paragraph designations for similar subject matter whenever possible*, even if the substance is changed from the Model Rules. For example, the exceptions to the general duty of confidentiality are stated in Model Rule 1.6(b). It will aid understanding of the rule if lawyers could always find that information in rule 1.6(b) in every jurisdiction.

4. *Place new and unique provisions at the at the end of the rule*. For example, if a jurisdiction wishes to add a new provision regarding imputation of conflicts, it should become new Rule 1.10(e) of that jurisdiction. As in Convention 2, this serves two purposes. It signals clearly that the jurisdiction has a new and different rule; and it reduces the confusion caused when unique state provisions are assigned rule numbers or paragraphs that cover different subjects in the Model Rules and other states.

5. *Place new or additional comments dealing with similar subject matter after the corresponding Model Rules comment*. For example, Comment [2] to Model Rule 1.13 concerns communications with a constituent of an organizational client. If the jurisdiction wishes to create an additional comment on that topic, the additional comment should be new Comment [2A]. Again, this will highlight the new material and minimize potential confusion. New comments with no analogous or related material in the Model Rules should be placed at the end of all other comments.

6. *Explain in comments any variations from the Model Rules*. There are many reasons why a jurisdiction, having made the decision to adopt the Model Rules and comments in general, may decide not to adopt particular provisions of those rules or comments. However, it is important for lawyers to know those reasons so they may better understand the rules and conform their conduct to the standards that the jurisdiction's supreme court has set.

IV. Oregon State Bar Report (2003).

Oregon is an ABA Code state, though its Code has been substantially revised over the years. It appointed a Rules Committee that recognized the advantages of adopting the Model Rule format but decided at first to review its Code rule by rule, comparing the language of its current Code sections to the Model Rules. The committee took an "if t ain't broke, don't fix it" approach, and replaced the current Oregon language only if warranted. It then went through those Model Rules that have no ABA Code counterpart (e.g., MR 1.13, analogous to Cal. Rule 3-600) and determined some of those rules should be added to the Oregon Code.

After identifying the substance of the rules it wanted, the Committee returned to address whether Oregon should adopt the Model Rules format and decided it should. The advantage cited were pretty much the same ones identified in Prof. Simon's article. In addition, the Committee also noted that both Washington and Idaho, with which whom it enjoys a reciprocity arrangement, are both Model Rules states; the Oregon House of Delegates adopted a directive of Oregon's Disciplinary System Task Force to make the Code simpler and clearer; and in 2002, Tennessee had become the 44th jurisdiction to adopt the Model Rules format.

The Committee then made a second review, starting with the Model Rules, which review was guided by three competing values: "uniformity; retention of those aspects of the rules that are unique to Oregon or special in some other way; and having the best written rule." After the review and adoption of most of the Model Rules and retention of some of the Oregon language, the Committee then recommended the adoption of the Model Rules format and rules, but not the comments, though they suggested the comment "be recognized as an interpretive guide."

AMERICAN BAR ASSOCIATION
COMMISSION ON EVALUATION
OF PROFESSIONAL STANDARDS

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the House of Delegates of the American Bar Association approves the "restatement" format of the Model Rules of Professional Conduct for the formulation of changes in the profession's ethical standards.

REPORT

This Report of the Commission On Evaluation of Professional Standards is limited to the Commission's recommendation that ethical standards governing the profession be promulgated in a "restatement" format consisting of black-letter Rules and explanatory Comments. This Report does not address the Commission's recommendations with respect to substantive Rules. Those recommendations will be addressed in the Commission's Report to the House of Delegates filed prior to the August 1982 Annual Meeting.

The-restatement format of the Model, Rules of Professional Conduct consists of 50 black-letter Rules, each accompanied by explanatory Comment. This format is a familiar and widely accepted means of presenting law. The Commission has two purposes in recommending the use of this format. One is to provide lawyers with rules in a convenient organization to which they can comfortably turn for answers to questions of professional responsibility. Anyone who has worked through a problem using the format of the existing Code of Professional Responsibility has discovered that frequently it may be necessary to search numerous Canons, Ethical considerations

and Disciplinary Rules to ascertain the proper course of conduct. While reviewing more than a single provision of a code is not an unusual task, the problem of doing so with the existing Code is substantially compounded by confusion about the substantive effects of the code's Canons and Ethical Considerations, which is discussed more fully below. For the individual lawyer with a busy practice such search can be burdensome and frustrating. The restatement format provides a more understandable and simplified organization for rules of ethical lawyering.

Our other major purpose in recommending the use of a restatement format is to provide reliable rules by eliminating confusion about which parts of the existing Code are enforceable. The Commission has concluded that such reliability cannot be achieved under the format of the existing Code.

The format of the existing Code consists of three parts, nine Canons, described as "general maxims," 129 Ethical Considerations, described as "aspirations," and 43 Disciplinary Rules, described as "minimum standards." It is a unique format. The Wright Committee, which drafted the Code between 1964 and 1969, conceived of this format to emphasize the distinction between enforceable standards of conduct – the Disciplinary Rules – and the more generally phrased exhortations. As explained in the Code Preamble, it was the intent of the Wright Committee that the Code's Canons and Ethical Considerations be and remain unenforceable.

That intent, however, has not been fulfilled. It has been frustrated by courts and disciplinary agencies increasingly treating the Code's three parts as one set of integrated, enforceable rules. The Code's Canons and Ethical Considerations have been employed substantively in disciplinary proceedings and as rules of trial procedure.

Early in Its work, the Commission on Evaluation of Professional Standards reviewed the problem of misuse of the Code's Canons and Ethical Considerations. After studying the cases and the Code carefully, we concluded that substantive use of the Canons and Ethical Considerations is inevitable and can be avoided only by a revision of the existing Code format. Substantive use of the Canons and Ethical Considerations occurs in part because they intertwine substantive legal propositions with nonsubstantive exhortation. The Code's Canons, for example, state that "a lawyer should preserve confidences" (Canon 4), that "a lawyer

should exercise independent professional judgment" (Canon 5), that "a lawyer should represent a client competently" (Canon 6), and that "a lawyer should represent a client ... within the bounds of law" (Canon 7). Each of these is a statement of general legal principle articulated by courts in cases dating back to before the turn of the century.

For practical purposes, there is no distinction between the substantive effect of these legal principles and the substantive effect of more specific Disciplinary Rules. Thus, in practical effect, the canons offer very general standards supplementary to the more specifically phrased standards in the Disciplinary Rules. However, the standards in the Canons are fundamentally different from those in the Disciplinary Rules. The breadth of the language of Canons goes far beyond the scope of specific Disciplinary Rules with the result that a Canon's standard may infinitely extend application of Disciplinary Rules or impose an independent standard apart from any Disciplinary Rule. The value of standards of ethical conduct to the individual lawyer who seeks to practice in professionally responsible ways lies is their definiteness. The very presence of Canons prevents such definiteness because their language is so sweeping as to be without fair limitation or fair warning. How such standards should be applied will inevitably be resolved only by hindsight.

Inspection of the Code's Ethical Considerations reveals problems of a similar nature. Many Ethical Considerations restate existing legal rules. For example. EC 4-6 states the rule that "the obligation to preserve confidences continues ... after termination of employment." Some Ethical Considerations appear to restate common law agency duties that lawyers share with other agents, but in language that would suggest that lawyer obligations are more expansive. Such expansion necessarily has implications in both disciplinary proceedings and malpractice litigation. One example is the lawyer's duty of communication. EC 7-8 states that a "lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of the relevant considerations." EC 9-2 states that "a lawyer should fully and promptly inform his client of material developments in the hatters being handled for the client." The duty of a lawyer to communicate has been recognized in both disciplinary proceedings and malpractice litigation. Other Ethical Considerations explain or illustrate Disciplinary Rules. These inevitably will be used substantively, not aspirationally, when Disciplinary Rules are applied.

A second reason that substantive use of Canons and Ethical Considerations is unavoidable is that. the very. presence of alternative standards provides opportunity for ad hoc conversion of those standards into enforceable rules, frequently after the fact. Illustrative of that process is the enforcement of the Code's Canon 9, which states that "a lawyer should avoid even the appearance of impropriety." That Canon has been applied to analyze the obligations of corporate counsel, the duties of the former government lawyer, representation adverse to a former client, representation in class action litigation, representation of opposing parties by related lawyers, representation of multiple witnesses in grand jury proceedings and imputed disqualification of lawyers associated in m law firm. It is submitted that so broad a statement does not provide reliable guidance to a lawyer seeking to determine what the ethical standards of the profession require in specific situations.

Conceivably, the Canons and Ethical. Considerations could be edited to further separate and, distinguish substantive legal proposition from exhortation. An alternative draft published by the Commission consisting of Canons, Ethical Considerations, Disciplinary Rules and comments illustrates that process. Such editing substantially reduces the number of Ethical Considerations, but results in a cumbersome organization that lawyers will not find convenient or coherent. Moreover, regardless of how carefully and conscientiously done, no degree of editing which truly preserves the "aspirational" aspect of the Code format can assure that Canons and Ethical Considerations in fact will be without substantive effect. Even the most general exhortation may later be employed as en independent rule or as gloss on a Disciplinary Rule. For example, the statement in EC 1-5 that a lawyer "should be temperate and dignified," has been employed substantively. Even changing the wording of the often misused Canon' 9 will not change the fact that the remaining Canons are legal principles that can have substantive effect. Perhaps the most convincing evidence on this point is provided by the report published by the National Organization of Bar Counsel. That report urges retention of the existing code format. Explaining the role of the Ethical Considerations, the NOBC report states:

> The NOBC recommends retention of Ethical Consideration's ... as a means of assisting in *interpretation* of the Disciplinary Rules ... Lawyers should not examine the mandatory rules for loopholes, but, rather, they should conduct their business well within the tolerances of 'aspirational' goals. (Emphasis added).

This statement by the NOBC goes directly to the heart of the matter. Whether called maxims or aspirations, it is inevitable that second and third tier standards will be used interpretatively to expand enforceable rules by hindsight. Lawyers who object to expansions undertaken without prior notice will be viewed by enforcement officials' as looking for "loopholes." Lawyers, who would never permit clients to be subject to such risks, should not accept such latent ambiguity in the law governing their right to practice law.

The existing Code format has thus become unreliable to the individual lawyer who consults its standards for guidance when confronted with a question of professional responsibility. Confusion about the substantive import of its Canons and Ethical considerations has fostered uncertainty and encouraged ad hoc development of professional standards without full deliberation by the profession. The Commission urges adoption of the restatement format to prevent this. A format consisting simply of Rules and explanatory Comment will give the individual lawyer reliable guidance as well as fair warning and fair limitation. Moreover, this format will permit the profession to evaluate fully any proposed modifications of its standards before such standards become law. Changes in professional standards will occur only as a result of careful deliberation and not by ad hoc conversion of exhortations into rules.

The only enforceable rules in the restatement text recommended by the Commission will be the express black-letter Rules. Prior to adoption, and when considering subsequent amendments, the profession will be able to focus directly on the substantive issues raised by those Rules. The Comments will serve the same explanatory and illustrative function that is served by comments accompanying other model legislation, for example the Uniform Commercial Code. While the Comment will be helpful in understanding the Rules, the actual text of the black-letter will be authoritative and controlling.

The Commission did not arrive at this recommendation without consideration of the costs that may be associated with revision of the existing Code format. One concern was the effect that such revision might have on national uniformity in the law of professional conduct. but we found that no such uniformity has been achieved under the existing Code. The Code format has neither been uniformly adopted nor given consistent treatment. Six states (California, Oklahoma, Massachusetts, Illinois, Maine. Michigan) adopted

codes without the Ethical Considerations. In some states, for example, Iowa, the Ethical Considerations as a whole are considered generally obligatory, thus rendering the distinction between Ethical Considerations and Disciplinary Rules meaningless. In still other states, Canons and Ethical Considerations have been treated as enforceable rules on an ad hoc basis.

We also considered the effect that a revision of format might have on the individual lawyer familiar with the format of the existing Code. Any inconvenience will be largely mitigated by the fact that the restatement format is widely accepted and familiar to lawyers everywhere. Lawyers everywhere have used ALI Restatements of law and modern model codes, such as the Uniform Commercial Code. Their formats are similarly organized and have been tooted and found to be workable and reliable. In contrast, no matter how well acquainted lawyers are with the existing Code, there are chronic and continuous complaints about its format. Furthermore, the format we propose is substantially similar to the format approved by this house for the recently adopted ABA Standards for Lawyer Discipline and Disability Proceedings, as well as the ABA Model Code of Judicial Conduct and the ABA Standards of Criminal Justice. Weighing the importance of preventing further substantive misuse of the existing Code format against the temporary inconvenience and marginal administrative costs of converting to the more traditional restatement format seems to us to compel the course we recommend.

We have been authorized and are pleased to state that the ABA Standing Committee on Ethics and Professional Responsibility and the ABA Standing Committee on Professional Discipline concur in our findings and our recommendation with regard to format for the formulation of changes in the profession's ethical standards.

Respectfully submitted,

Robert J. Kutak
Chairman

January, 1982

Should New York Adopt The ABA Model Rules?

By ROY SIMON

For the last year, the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") has been reviewing and revising the New York Code of Professional Responsibility. The review is now bearing fruit. On December 30, 2003, COSAC posted its first four proposed rules on the New York State Bar Association's web site, www.nysba.org, and asked the bench, bar, and public to submit comments by March 31, 2004. [*See*, NYPRR, February 2004, pages 9-10] The proposed rules adopt the format and much of the language of the ABA Model Rules of Professional Conduct. Consequently, many New Yorkers are asking whether New York should adopt the ABA Model Rules of Professional Conduct. This article gives my views on that question. (I serve as Vice-Chair of COSAC and the Chief Reporter for the project, but the views expressed here are strictly my own and have not been approved or endorsed by COSAC.)

The status quo

New York's current Code of Professional Responsibility is based on the old ABA Model Code of Professional Responsibility, which was originally written in the late 1960's and adopted in New York effective January 1, 1970. The numbering system and much of the language in New York's Code are taken verbatim from the ABA Model Code. Like the old ABA Code, the New York Code of Professional Responsibility divides the Code into (1) nine separate axiomatic "Canons," which are basically like chapter headings; (2) Ethical Considerations ("EC's") in each Canon, which are "aspirational" (meaning that a lawyer may not be disciplined for violating them); and (3) Disciplinary Rules ("DR's"), which are "mandatory" in character, meaning that a lawyer may be disciplined for violating them). (The New York courts have adopted only the Disciplinary Rules, not the Ethical Considerations, but this makes little difference because courts and disciplinary authorities still turn to the EC's for guidance and interpretation.)

The ABA began developing the Model Rules in 1976, when the ABA appointed the Kutak Commission. The Commission originally intended merely to update and amend the Model Code of Professional Responsibility, but the Commission soon realized that the Model Code had many flaws and should be entirely replaced by a new set of rules in a "Restatement" format, with each black letter Rule followed by an explanatory Comment. In 1983, the ABA formally adopted the ABA Model Rules of Professional Conduct to replace the Model Code. In 1984, New Jersey became the first state to adopt a version of the ABA Model Rules of Professional Conduct, and in succeeding years more and more states have adopted the ABA Model Rules. Today, 43 states and the District of Columbia use a Model Rules format. Two states, California and Maine, have each adopted a unique format. Only five states continue to use the Model Code format (Canons, EC's, and DR's): New York, Iowa, Nebraska, Ohio, and Oregon. But in February of 2004, the Oregon Supreme Court tentatively approved conversion to an ABA Model Rules format, and amended ethics rules in the ABA Model Rules format are also pending before the Iowa Supreme Court. Committees in Ohio and Nebraska are actively studying a conversion to the ABA Model

Rules format. Soon, therefore, New York may be the only state that retains the old ABA Model Code format.

The ABA has worked hard to keep the ABA Model Rules up to date. Since 1987, the ABA has amended the Model Rules nearly every year. In 1997, to keep up with globalization, advances in technology, and the new Restatement of the Law Governing Lawyers, the ABA created a blue-ribbon Ethics 2000 Commission to re-evaluate the entire ABA Model Rules of Professional Conduct. In 2001 and 2002, the ABA House of Delegates approved nearly all of the changes proposed by the Ethics 2000 Commission, as well as additional changes proposed by the ABA Commission on Multijurisdictional Practice, which made sweeping changes to the rules governing lawyers who practice law in states where they are not admitted to the bar.

The old Model Code, meanwhile, has remained stagnant – the ABA has not amended it since the ABA adopted the Model Rules in 1983. But New York has amended its own Code frequently. The New York courts adopted comprehensive amendments to the Code in 1990, after the State Bar rejected the ABA Model Rules. The courts amended specific rules in the New York Code in 1994 and 1996. In 1999, the courts again comprehensively amended the Code. In 2001, reacting to a national debate over so-called "multidisciplinary practice," the New York courts adopted two new Disciplinary Rules (DR's 1-106 and 1-107) to define the responsibilities of lawyers who are involved in providing non-legal services and to establish detailed rules for contractual relationships between lawyers and nonlegal professionals. The Code has not been amended since 2001, but in July of 2003 the New York State Bar Association sent the courts proposed amendments to DR 1-105(B) and 3-101(B) that would permit so-called "multijurisdictional practice" by lawyers from outside New York. Those proposals remain pending.

COSAC and its work

Because the legal profession is changing rapidly, the New York State Bar Association created COSAC as a standing committee to monitor and propose changes to the rules regulating lawyers and law practice in New York. COSAC is a hand-picked committee composed of twenty-two lawyers who are familiar with legal ethics issues. The members are from around the state – Rochester, Buffalo, Albany, Schenectady, and Windham, as well as from Brooklyn, Queens, Long Island, and New York City. COSAC members work in large firms and solo practice; they represent large corporations and ordinary individuals; some are litigators, while others are transactional lawyers; some represent mostly plaintiffs, others represent mostly defendants, and some represent both; one member works in-house at a large corporation, another works in New York City's legal department, and still another works at a legal services office; two members are law professors, and one member is a sitting state court judge. In sum, COSAC is a diverse, well-balanced committee with a wealth of experience in the ethics field and a wide range of perspectives on the regulation of lawyers.

COSAC has divided the ABA Model Rules into three groups, with a separate Subcommittee of COSAC in charge of each group, and each Subcommittee has hired a Reporter. The Reporters are law professors who are highly regarded in the field of legal ethics – Steven Wechsler of Syracuse University School of Law, Roger Cramton of Cornell Law School, and Carol Ziegler of Brooklyn Law School. The Subcommittees are comparing the current New York Code to the

ABA Model Rules and deciding whether the ABA provisions on a given subject are preferable in light of the unique circumstances affecting the public and the legal profession in New York State. Then the Subcommittees refine the language, sentence by sentence and word by word, to make sure it provides clear, workable guidance to New York lawyers..

After deciding the text of the black letter rule, the Subcommittee marches paragraph by paragraph through the ABA Comment that follows each rule and revises it to the extent necessary, to reflect the text of the proposed New York rule or to amplify or clarify the ABA's language. If the full Committee eventually approves the proposed new rules, they are posted (together with comments by the Reporters to explain COSAC's thinking process) on the State Bar's web site for a period of public comment. Proposed rules will be revised in light of the public comments, and within a year or two COSAC will present a full set of proposed rules to the State Bar House of Delegates. Eventually, the House of Delegates will forward a single, comprehensive package of rules to the courts, which will adopt, reject, or modify each proposed rule on its own merits. The process of judicial approval could take a long time – after the House of Delegates sent the Krane Committee's proposed Code amendments to the courts in March of 1997, the courts took more than two years to act on the proposals.

The main question: Tradition or transformation?

The primary question today is whether to stick with New York's 33-year-old tradition of the Code format or whether to transform the New York Code to the format of the ABA Model Rules of Professional Conduct. Which alternative is better for New York?

In my view – and again, I am speaking only for myself, not for COSAC – there are few reasons to stick with the current clumsy format of the New York Code, and many reasons to transform our Code to a Model Rules format. In particular, I think New York should adopt the format and numbering of the ABA Model Rules virtually without change. Moreover, I think New York should use the language of the ABA Model Rules as a working base, and then – in light of the rich history and special characteristics of the legal profession in New York – we should build and improve on the ABA Model Rules by: (1) using the ABA language where New York's current language offers no significant advantage; (2) keeping any New York Code language that we like much better than the ABA language; and (3) improving both the ABA and the New York language where necessary to clarify the meaning, to fill gaps, to make the rules more practical, or to serve other purposes. The guiding philosophy in every instance is to produce the best possible ethics rules for the lawyers, judges, and people of New York State.

What are the advantages of adopting the ABA Model Rules format and building on its language and organization, rather than simply amending the New York Code of Professional Responsibility while retaining its present format and numbering scheme? I will suggest five important advantages to transforming our Code to a Model Rules format.

Easier to use. No matter what the ethics rules may say, they won't serve their purpose unless attorneys can find the rules they need and understand their meaning. One serious problem with our current Model Code format is that the Ethical Considerations, which often explain the Disciplinary Rules, are not correlated with the Disciplinary Rules. For example, suppose you

want to know the meaning of the phrase "reasonable advance notice" in New York's unique DR 7-104(B). Where do you look? There is an Ethical Consideration that defines "reasonable advance notice," but which one? Canon 7 contains thirty-nine separate EC's – nearly eight small-print pages in the State Bar's edition of the Code – and nothing tells a lawyer which EC explain which DR. Should a lawyer read through every EC until she finds the right one? (Maybe you can find the right one, since you are interested in legal ethics – but can your partner or associate find it without your help?) And some EC's relate to DR's in other Canons. For example, the last sentence of EC 7-8 states that if a client in a non-adjudicatory matter "insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." That language relates directly to DR 2-110(C)(1)(e). What is this language doing in EC 7-8, without any cross-reference to DR 2-110?

The ABA Model Rules format helps solve these problems. First, the ABA format prints a Comment right after each rule. Some Comments contain many paragraphs, but the ABA uses headings to provide guidance. Second, many Comments refer to specific paragraphs of the rules they are explaining. For example, Comment 15 to ABA Model Rule 1.7, which is in a series of Comments headed "Prohibited Representations," notes that "under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation." Those cross-references to specific paragraphs are enormously helpful in understanding the rules.

More topics. The ABA Model Rules cover many topics that the New York Disciplinary Rules do not cover. For example, ABA Model Rule 1.18 ("Duties to Prospective Client"), which was added to the ABA rules in 2001, deals in detail with the obligations of a lawyer and a lawyer's law firm to people who discuss the possibility of forming an attorney-client relationship but then hire a different lawyer (or don't hire anyone). New York has no equivalent, unless you count the first sentence of EC 4-1, which says that a lawyer has an obligation to preserve the confidences and secrets of one who has employed "or sought to employ" the lawyer. Or consider ABA Model Rule 1.6(b)(4), which permits a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary "to secure legal advice about the lawyer's compliance with these Rules." New York has no equivalent, even though New York lawyers have for years contacted bar association ethics committee or lawyers outside their firms to get advice on ethics issues. Or consider ABA Model Rule 1.2(a), which flatly states that a lawyer "shall abide by a client's decision whether to settle a matter." New York relegates that important concept to a clause in EC 7-7 ("it is for the client to decide whether to accept a settlement offer"). Shouldn't our rules of ethics govern issues that arise frequently? Shouldn't our rules reflect the customs of our profession, especially when those customs foster ethical professional conduct?

Expanded research database. Adopting the ABA Model Rules format would vastly increase our access to useful research sources regarding legal ethics. Today, the database for researching the New York Code of Professional Responsibility is thin. Although four different ethics committees in New York State have issued ethics opinions for decades (the ethics committees of the New York State Bar Association, the Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Nassau County Bar), their total output remains

miniscule. All of the ethics opinions ever published by the four active ethics committees fit on less than half of a standard law library bookshelf – about the volume of opinions the New York Appellate Division puts out in a single year. Judicial opinions also occasionally address legal ethics questions, but most of these opinions address ethics questions that arise during litigation. Even combining the judicial opinions and the ethics opinions, therefore, New York lawyers don't have a large enough database to answer many of the questions that arise about professional conduct.

If we converted to a Model Rules format, however, we could access up-to-date cases and ethics opinions from nearly every Model Rules jurisdiction, plus the ABA itself. This is a substantial body of ethics law. As mentioned above, nearly all other jurisdictions currently use a Model Rules format and most of the ABA Model Rules language, and four of the states that still use the Model Code format are in various stages of moving to the Model Rules format. If New York follows this trend and joins the Model Rules bandwagon, looking for cases and ethics opinions from other states will be relatively easy. Searching by rule number is usually easier than searching for specific words on an online research service. For example, the best legal ethics research site on the web, the American Legal Ethics Library at Cornell Law School's Legal Information Institute (www.law.cornell.edu/ethics), is organized according to the Model Rules numbering system. Any lawyer who knows the ABA Model Rules numbering system can easily search for rules, ethics opinions, and commentary on any given rule from nearly every state. (If you've never tried the Cornell site, try it – you'll like it.) It is true that states have adopted their own variations on the ABA Model Rules, but most of these variations retain enough of the Model Rules language to make it worthwhile to read cases and ethics opinions construing them.

If New York stays with the Model Code format, on the other hand, we will become increasingly isolated from the national research databases for legal ethics. Precedents from other states will be of little relevance and New York lawyers will have to be content with the small database of New York cases and ethics opinions, many of which are already out of date due to amendments in the Code language over the years.

National practice. When New York lawyers litigate outside New York, they are subject to the rules of the jurisdiction where the action is pending. New York's own DR 1-105(B)(1) provides that if New York disciplinary authorities charge a New York lawyer with improper conduct in connection with a proceeding in a court before which the lawyer has been admitted to practice (either generally or *pro hac vice*), "the rules to be applied shall be the rules of the jurisdiction in which the court sits …." Thus, New York lawyers who litigate in state or federal courts in other states have to learn the ABA Model Rules format, because most states are Model Rules states. Why should New York lawyers who litigate in Connecticut, Massachusetts, New Jersey, Pennsylvania, Vermont, or anywhere else have to learn a whole new ethics language? I don't think they should.

Greater influence outside New York. Adopting the Model Rules format would also give New York courts and ethics committees increased influence on the development of the law nationally. We want that influence so that New York lawyers who litigate in other states will encounter interpretations of the ethics rules similar to New York's interpretations. Even today, New York opinions can be highly influential in other jurisdictions when New York's Code language is close

to the Model Rules language used in most states. *See, e.g., Niesig v. Team I,* 76 N.Y.2d 363 (1990), a leading case interpreting DR 7-104 (the "no-contact" rule), and *Lord, Day & Lord v. Cohen,* 75 N.Y.2d 95 (1989), a leading case limiting penalties for lawyers who compete with their former firms. The closer New York's Disciplinary Rules are to the rules of other jurisdictions, the more influential New York's interpretations will be outside New York. But if New York continues to follow the Model Code format and rejects the Model Rules language, New York will have less and less influence on the way other states interpret their ethics rules.

Downsides to adopting a Model Rules format

Of course, there may be some downsides to converting to a Model Rules format, and converting to a Model Rules format may not be necessary to remedy the problems with our current Code of Professional Responsibility. In this section I will address some of the possible problems.

Jarring change? Would conversion to the Model Rules language and format cause a jarring change among New York lawyers? I doubt it. Law students today focus on the ABA Model Rules, not on the New York Code of Professional Responsibility, even in the fifteen law schools located in New York. That has been true for over a decade because all of the major professional responsibility textbooks are geared to the ABA Model Rules – and because lawyers in 43 states and the District of Columbia are going to be practicing under a Model Rules format. (When I conduct CLE programs, I occasionally ask how many lawyers have had systematic instruction in the New York Code of Professional Responsibility. Fewer than 10% usually raise their hands. Have you asked your associates whether they have systematically studied the New York Code of Professional Responsibility?) Even most practicing lawyers in New York have invested relatively little time learning the New York Code of Professional Responsibility. There will undoubtedly be some transition pain, but lawyers must be able to find the guidance they are looking for, which is often difficult under the current Code, and the rules must be clearly written and make sense for lawyers, clients, and the public in light of New York's special circumstances and traditions. As I see it, that is COSAC's main goal. We could simply revise the language of the New York Code without changing the format, but why would we do that? What would we gain? In my view, we would gain nothing.

Neither fish nor fowl. Unfortunately, COSAC's custom-tailored approach to revising the Code of Professional Responsibility has a big disadvantage. As Professor Bruce Green of Fordham recently pointed out at the annual CLE program sponsored by the State Bar's Committee on Professional Discipline, where he was asked to argue against the Model Rules for the sake of stimulating discussion, COSAC is risking the benefits of national uniformity by proposing neither to keep the existing New York Code nor to adopt the ABA Model Rules of Professional Conduct. Rather, COSAC intends to propose a unique set of rules that is neither fish nor fowl. That will cause us to lose the body of court cases and ethics opinions interpreting the New York Code. At the same time, since COSAC is modifying the language of many of the ABA Model Rules, New York lawyers will not be able to draw fully on the substantial body of ethics opinions and other guidance issued by the ABA itself. Nor will we be able to use ethics precedents from other states until we determine whether those states use the same wording that New York uses. Thus, the interpretative problems with the COSAC rules could be formidable.

Personally, I'm not concerned. First, COSAC plans to keep language from the New York Code whenever that language has a decided advantage over the language of the Model Rules. As 9th Judicial District Chief Disciplinary Counsel Gary Cassella noted at the same CLE program on which Bruce Green appeared, we can adopt the Model Rules format but still tailor the language to retain whatever elements of New York law that we like. If we like old case law like *Lord, Day & Lord v. Cohen* or *Niesig v. Team I,* we can write those holdings into the rules. We don't need to retain the entire Code and its awkward format to preserve a handful of key concepts. Whether a particular New York phrase has a well established interpretation is relevant to making the choice between the existing New York Code and the ABA Model Rules. In the end, much of New York's Code language and the accompanying body of interpretive guidance will remain intact.

Second, the problem that worries Prof. Green already exists, and it hasn't hurt us much. Already, several New York rules do not match either the Model Code or the Model Rules. Consider New York's DR 1-102(A) (imposing professional discipline on law firms as entities), DR 1-104 (imposing special supervisory obligations on New York lawyers), DR 1-107 (governing contractual obligations between lawyers and nonlegal professionals), DR 5-105(E) (requiring New York law firms to check for conflicts of interest), DR 7-104(B) (governing a lawyer's encouragement of client-to-client contact between parties represented by counsel), and DR 9-102 (which is much more detailed than the client funds rule in the ABA Model Code or Model Rules). All of these rules are unique to New York, but we adopted them because they improve the guidance available to lawyers who practice here. That should be the test for COSAC's work as well. As long as our entire revised Code is not totally unique (like California's), we will get used to it quickly and benefit from the changes.

Send in your comments

The initial COSAC proposals are posted on the web at www.nysba.org. Thanks to recent advances in technology, this marks the first time that proposed New York ethics rules are posted on the web. Moreover, COSAC is encouraging people to send comments by email, so commenting on the proposed ethics rules is easier than ever. COSAC needs the help of lawyers – especially lawyers with experience handling ethics questions – to evaluate these proposals. If you want to help produce the best possible set of Rules of Professional Conduct for New York, please review the proposals and send COSAC your thoughts.

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Form Over Federalism: The Case for Consistency in State Ethics Rules Formats*

Robert A. Creamer

State ethics rules are now in play nationwide. The work of the American Bar Association's Commission on the Evaluation of the Rules of Professional Conduct, popularly known as the Ethics 2000 Commission, is virtually complete. The ABA House of Delegates finished its review of the Commission's proposed revisions to the Model Rules at the February 2002 midyear meeting.[1] The House approved substantially all of the Commission's recommendations, and so the Ethics 2000 version of the Model Rules have become the new ABA Model Rules.

Because forty-three jurisdictions have adopted some form of the original 1983 version of the Model Rules, bar associations and courts in nearly all of those jurisdictions have or will soon appoint committees to review the 2002 version of the Model Rules and make recommendations for changes to their existing rules. This simultaneous nationwide review of state ethics rules offers a rare chance to correct a real defect in the current system: the inconsistent and sometimes bewildering formats that many jurisdictions have used in adapting their rules to the Model Rules.

The purpose of this paper is to urge those who are reviewing their state rules to seize this unique opportunity to recast the form of those rules in a manner consistent with the ABA Model Rules. Six simple "Conventions of Consistency" are listed at the end of this paper. Following these conventions would result in a consistent format for legal ethics rules in all states. This, in turn, will enable lawyers to promptly and safely determine whether and how any particular state ethics rule varies from the corresponding ABA Model Rule.

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1. Consideration of revisions to Model Rules 5.5 and 8.5 was deferred pending the final report of the ABA Commission on Multijurisdictional Practice. The revisions to Model Rules 5.5 and 8.5 proposed by that commission were approved by the House of Delegates at the August 2002 annual meeting.

THE CURRENT SITUATION

The current situation of state ethics rules formats is a crazy quilt. Forty-two states and the District of Columbia have adopted a form of the 1983 Model Rules. Among the rest, New York and Oregon have retained the format of the 1969 ABA Model Code of Professional Responsibility, but engrafted several provisions of the Model Rules into the Model Code format.[1] Even California, which has its own unique system of rules, has borrowed Model Rules language for some of its rules of conduct.[2]

A majority of the jurisdictions that have adopted a form of the Model Rules have kept their rules format substantially consistent with the Model Rules, but several have strayed to varying degrees. The most common variation appears to be in the rules regulating lawyer advertising and solicitation. Many states have altered both the form and substance of those rules.[3] Fortunately, these changes have usually been made within the general Model Rules format, and therefore substantive variations are relatively easy to locate.

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2. For example, New York DR 1-105 ("Disciplinary Authority and Choice of Law") is almost identical to Model Rule 8.5; New York DR 5-108 ("Conflict of Interest - Former Client") is based on provisions of Model Rules 1.9 and 1.10; and New York DR 1-109 ("Organization as Client") incorporates most of Model Rule 1.13.

3. For example, California Rule 3-300 ("Avoiding Interests Adverse to a Client") is substantially similar to Model Rule 1.8(a); and California Rule 3-600 ("Organization as Client") is clearly derived from Model Rule 1.13.

4. For example, the District of Columbia adopted an amended Model Rule 7.1 and omitted Model Rules 7.2, 7.3, and 7.4 entirely, but retained Model Rule 7.5.

Another subject of frequent revision is Model Rule 1.6, the rule on confidentiality of client information. Most states have amended Model Rule 1.6 to expand the circumstances in which a lawyer *may*, or in a few states *must*, disclose a client's criminal or fraudulent conduct.[1] Like the changes to the advertising rules, these variations have typically been located in each state's version of Rule 1.6, so that any lawyer familiar with the Model Rules should find them readily.

Changes in many other state rules have not been as easy to track. As noted above, Oregon adopted much of the substance of the 1983 Model Rules, but retained the 1969 Model Code format. It has also created some new provisions. For example, unlike either the 1983 Model Rules or the Model Code, Oregon has a separate rule [Oregon DR 10-101] on definitions. The definition in DR 10-101(B)(2) of "full disclosure" in the context of consent to an actual or likely conflict of interest imposes the substantive requirement that disclosure must "include a recommendation that the recipient seek independent legal advice to determine if consent should be given and shall be contemporaneously confirmed in writing." This significant duty is not referenced in the conflicts provisions of the Oregon rules, and so it is not likely to be noted by a lawyer not already familiar with those rules.

Texas adopted most of the Model Rules, but renumbered the rules that it chose in its own unique system. It added a digit, usually a zero, to many of the rule numbers so that all the rules have three-digit numbers. Thus, the rule on fees [Model Rule 1.5] is now Texas Rule 1.05. Model Rule 2.2 ["Intermediary"] was revised and renumbered to become Texas Rule 1.07. The rule on organizational clients [Model Rule 1.13] became Texas Rule 1.12. These changes are logical and would cause no confusion if the Texas rules were the only set of rules. However, these rules are only a part of the national system of lawyer regulation, and changing the numbering system can create confusion among Texas and non-Texas lawyers alike. The greatest disservice may be to Texas practitioners researching the Model Rules analogues from which their rules are derived. Unless the lawyers work regularly with the ethics rules, such research will be challenging.

But Oregon and Texas are not alone. While Illinois generally followed the Model Rules format when adopting its current rules, it parked provisions held over from its former rules, which were based on the Model Code, in places where many lawyers are unlikely to find them. One example is Illinois Rule 1.2, titled "Scope of Representation" as is the corresponding Model Rule. However, in addition to the five paragraphs of the Model Rule (one of which has been moved from paragraph (e) to a new paragraph (i)),

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5. For an explanation of the variations, *see* Reporter's Note to *Restatement Third, The Law Governing Lawyers* § 67 (2000).

four new and different subjects are covered by the rule. New paragraph (e) perpetuates a former Illinois Code provision [DR 7-105] against threatening criminal charges to gain an advantage in a civil matter, a prohibition not found in the Model Rules. Regardless of whether this rule is good policy, its obscure placement suggests that many Illinois lawyers may never find it, even if they are looking for such a rule.

Another anomaly in Illinois Rule 1.2 is that new paragraphs (f), (g), and (h), which deal primarily with a lawyer's duties with respect to representation in litigated matters, cover topics that are also covered in Illinois Rules 3.1 and 3.3. Illinois Rule 1.2(f) is simply repetitious of Illinois Rule 3.1, which is substantially the same as Model Rule 3.1. Of greater concern is Illinois Rule 1.2(g), another former Illinois Code provision [DR 7-102(b)] that deals with a lawyer's duty of candor to a court in cases of client fraud. Illinois Rule 1.2(g) is inconsistent with Illinois Rule 3.3(b) on the same subject, giving Illinois lawyers potentially conflicting directions in this important situation.[1] If more attention had been paid to the form of the rules, the substantive confusion most likely would have been avoided.

Another instance where a change in form could have substantive consequences is shown by a recent (October 2001) amendment to the Missouri Rules of Professional Conduct. The amendment was a new provision that deals with potential conflicts of interest of private lawyers who also hold public office. It became new paragraph (d) of Missouri Rule 1.11, which is analogous to Model Rule 1.11, and entitled "Successive Government and Private Employment." The change displaced original paragraphs (d) and (e), which became new paragraphs (e) and (f), respectively, making those provisions less easy to find. Moreover, the new provision concerns *simultaneous*, rather than *successive*, public and private service, formerly the only subject of the rule. Thus, many lawyers will have difficulty finding the new provision even if they are aware that such a rule exists. In contrast, when New Hampshire adopted a new regulation concerning private lawyers holding public office, it created a separate rule, which became that state's Rule 1.11A. There is much less chance for confusion in this format.

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6. For an explanation of the inconsistency between Illinois Rules 1.2(g) and 3.3(b), *see* Illinois State Bar Association Opinion 94-24 (May 17, 1995) .

Several jurisdictions have made similar types of changes.[1] Some, like Washington, that did not adopt Model Rule 1.13 on organizational clients, failed to reserve that rule number and renumbered subsequent rules so that those numbers do not match the corresponding Model Rule numbers. Others have moved the definitions or "Terminology" section of their rules to the end, rather than the beginning of the rules, as in the Model Rules. Again, such changes would not matter in a world with only one set of ethics rules. But these inconsistencies can cause needless confusion, especially among those who are familiar with the Model Rules format. As explained below, a majority of lawyers in every state are in fact already familiar with the Model Rules.

A final observation on the current situation in state ethics rules is that several states that adopted a form of the Model Rules nevertheless failed to adopt the ABA comments to those rules.[2] This omission is more than an issue of form. The comments are an integral element of the Model Rules. The ABA comments were reviewed and revised by the Ethics 2000 Commission with the same care and attention as the black letter rules, and they were subject to the same approval process by the House of Delegates. Thus, the ABA comments provide important explanatory detail to the Model Rules, information that could be critical to the application of the rules by practicing lawyers. The present review process offers an opportunity for those states without comments to correct that unfortunate situation.

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7. For example, the counterparts in various states to Model Rule 1.16 on declining or terminating representation include Kentucky Rule 3.130, Nevada Rule 166, Rhode Island Rule 1.17, Texas Rule 1.15, and Washington Rule 1.15.

8. These states include Arizona, Illinois, Louisiana, Montana, Nevada, Oregon, Rhode Island, and Washington.

THE MODEL RULES RULE

Despite the variation among the states, the Model Rules format is the *lingua franca* of ethics discourse. All the standard works on legal ethics, including the treatises by Professors Hazard and Hodes, Professor Wolfram, and Professor Rotunda, are organized around the Model Rules format.[1] The American Legal Ethics Library of the Legal Information Institute, Cornell Law School, the primary source of ethics rules and commentary on the Internet, is organized on the Model Rules format. Another important primary reference work on ethics, the *Annotated Model Rules of Professional Conduct* (4th ed. 1999), published by the ABA, is organized on the Model Rules. Finally, the principal periodical on ethics and professional responsibility, the *ABA/BNA Lawyers' Manual on Professional Conduct*, also organizes its reporting on the Model Rules.

Even lawyers who do not work regularly with ethics issues are likely to be familiar with the Model Rules. Every law school that is accredited by the ABA must teach the Model Rules to all its students. Standard 302(b) of the ABA *Standards of Approval of Law Schools* (2001) provides that a law school "shall require all students in the J.D. degree program to receive instruction in the responsibilities of the legal profession and its members, including instruction in the Model Rules of Professional Conduct." For that reason, the Model Rules have become part of the standard law school curriculum.

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9. These treatises are: *The Law of Lawyering* (3d ed. 2001), by Professors Geoffrey C. Hazard, Jr., of the University of Pennsylvania Law School, and W. William Hodes, of Indiana University School of Law (Emeritus); *Modern Legal Ethics* (1986), by Professor Charles W. Wolfram of Cornell Law School; and *Legal Ethics, The Lawyer's Deskbook on Professional Responsibility* (2000), by Professor Ronald D. Rotunda of the University of Illinois College of Law.

Study of the Model Rules continues beyond law school for the vast majority of American lawyers. The Multistate Professional Responsibility Examination (MPRE) is now required for admission to the bar of every United States jurisdiction except Maryland, Washington, and Wisconsin.[1] For questions on the MPRE that deal with lawyer discipline, the correct answer will be governed by the current ABA Model Rules .[2] Regarding individual state ethics rules, the National Conference of Bar Examiners, the sponsor of the MPRE advises: As a general rule, particular local statutes or rules of court will not be tested in the MPRE.[3] Thus, the ethics rules format that most practicing lawyers know, regardless of where they practice, is the Model Rules format.

FORM DOES MATTER

There is no dispute that the most important task of any committee reviewing its state ethics rules will be to seek the right result on the substance of each rule. But form can have important consequences. An elegant rule is of little use if a significant number of practitioners are unlikely or unable to find it when they have an ethics issue to resolve.

Outside the area of ethics, there seems to be general agreement that a consistent format is appropriate for regulatory schemes with multijurisdictional application. No one would suggest, for example, that the Uniform Commercial Code should take a different form in different states. Recognition of the need to avoid confusion and misunderstanding of the law governing commercial transactions has apparently overcome any local interests in maintaining unique statutory formats.

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10. *See* National Conference of Bar Examiners Web site: www.ncbex.org/tests.htm.

11. *Id.*

12. *Id.*

The same approach should apply to state ethics rules. Like the issues governed by the Uniform Commercial Code, the practice of law is no longer a purely local matter. The work of the ABA Commission on Multijurisdictional Practice (MJP Commission) has shown that an increasing number of lawyers now represent clients in connection with transactions and litigation that take place in jurisdictions where the lawyers may not be licensed. The MJP Commission's Final Report (August 2002) recommended that Model Rule 5.5 be amended to permit a lawyer admitted in another United States jurisdiction to render legal services in certain common situations on a temporary basis in a jurisdiction in which the lawyer is not admitted.[1] These situations include services that: (1) are undertaken in association with a local lawyer who participates actively in the matter; (2) are reasonably related to a pending or potential proceeding before a tribunal if the lawyer is authorized to appear in the matter or reasonably expects to be authorized; (3) are reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding if the services are reasonably related to the lawyer's practice where the lawyer is admitted and are not services for which the forum requires *pro hac vice* admission; or (4) are not within (2) or (3) above, but are reasonably related to the lawyer's practice where the lawyer is admitted.

The MJP Commission's Final Report also recommended an amendment to Model Rule 8.5 to provide a new choice-of-rule provision that will make a state's legal ethics rules applicable to conduct of any lawyer rendering or offering to render legal services in that state, even if the lawyer is not licensed there.[2] (The proposed 1amendments to Model Rules 5.5 and 8.5 were approved by the House of Delegates at the August 2002 annual meeting and are now part of the Model Rules.) If out-of-state lawyers are to be bound by a state's legal ethics rules when providing services in that state, it is obviously in the state's interest to facilitate compliance with those rules by those not familiar with them.

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13. The MJP Commission's Final Report is available at www.abanet.org/cpr. *See* Recommendation 2.

14. *Id.*, *see* Recommendation 3, proposing to add to Model Rule 8.5(a) the following sentence: "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction."

Given these recent changes in the Model Rules concerning multijurisdictional practice, it seems safe to predict that the incidence of multijurisdictional practice will continue to grow. This means that lawyers will need to consult the ethics rules of other states more frequently than in the past. Lawyers are more likely to find the rules provision relevant to their inquiry if they are already familiar with the rules format. This may be especially true in times of stress, which may be the only time that many lawyers consult the ethics rules.

Fortunately, there seems to be no compelling reason not to follow a consistent ethics rules format based on the Model Rules in every jurisdiction. Even if following the Model Rules format in a particular jurisdiction would result in substantial changes to the existing rules, such changes would cause little, if any, confusion among the majority of practicing lawyers. As discussed above, the average lawyer's acquaintance with ethics rules is most likely to be based on the Model Rules. For ethics mavens, there will be no confusion at all because they already know the Model Rules.

The only conceivable argument against adoption of a format consistent with the Model Rules might be that it would take too much of the drafting committee's time. However, the relatively small number of hours spent by the drafting committee conforming a state's rules to the Model Rules format will surely save countless additional hours of lawyers trying to translate that state's system in the future. The cost-benefit analysis for the profession seems clear.

In sum, it seems evident that an ethics rules format that is consistent from state to state will assist all lawyers in finding the rules that govern their conduct. A consistent format may even help lawyers to better learn and understand the ethics rules.[1] The only way to achieve such consistency is to use the ABA Model rules as a template. The following conventions are an attempt to aid that result.

CONVENTIONS OF CONSISTENCY

1. Use the 2002 Model Rules numbering system for all "black letter" rules and comments.

2. If a particular rule, paragraph, or comment of a Model Rule is not adopted, leave that rule, paragraph, or comment blank. Designate omitted rules, paragraphs, or comments as "reserved." This serves two purposes. First, it tells the lawyers in that jurisdiction and the rest of the world that the jurisdiction decided not to adopt or modify that particular provision of the Model Rules. Second, it eliminates the need to renumber the rules,

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15. A discussion of the influence of a consistent format on learning is beyond the scope of this short paper. However, recent studies of the learning process have suggested that consistent context can play an important role in conceptual processing. *See* Jeffrey P. Toth and Eyal M. Reingold, "Beyond Perception: Conceptual Contributions to Unconscious Influences of Memory," in *Implicit Cognition*, Geoffrey Underwood ed., Oxford University Press (1996).

paragraphs, or comments that follow, a practice that would inevitably cause additional confusion.

3. Keep the same rule and paragraph designations for similar subject matter whenever possible, even if the substance is changed from the Model Rules. For example, the exceptions to the general duty of confidentiality are stated in Model Rule 1.6(b). It will aid understanding of the rule if lawyers could always find that information in rule 1.6(b) in every jurisdiction.

4. Place new and unique provisions at the at the end of the rule. For example, if a jurisdiction wishes to add a new provision regarding imputation of conflicts, it should become new Rule 1.10(e) of that jurisdiction. As in Convention 2, this serves two purposes. It signals clearly that the jurisdiction has a new and different rule; and it reduces the confusion caused when unique state provisions are assigned rule numbers or paragraphs that cover different subjects in the Model Rules and other states.

5. Place new or additional comments dealing with similar subject matter after the corresponding Model Rules comment. For example, Comment [2] to Model Rule 1.13 concerns communications with a constituent of an organizational client. If the jurisdiction wishes to create an additional comment on that topic, the additional comment should be new Comment [2A]. Again, this will highlight the new material and minimize potential confusion. New comments with no analogous or related material in the Model Rules should be placed at the end of all other comments.

6. Explain in comments any variations from the Model Rules. There are many reasons why a jurisdiction, having made the decision to adopt the Model Rules and comments in general, may decide not to adopt particular provisions of those rules or comments. However, it is important for lawyers to know those reasons so they may better understand the rules and conform their conduct to the standards that the jurisdiction's supreme court has set.

CONCLUSION

The completion of the ABA Ethics 2000 review and revision of the Model Rules of Professional Conduct has led to the near simultaneous review of ethics rules throughout the United States. If the reviewers in each state are willing to follow a few simple conventions, they can easily address important local substantive concerns in a form compatible with the Model Rules format, the format with which their lawyers are already familiar. A consistent rules format in all jurisdictions will make lawyers better informed about their duties to their clients, the courts, and the profession.

ENDNOTES

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REPORT

of the

SPECIAL LEGAL ETHICS COMMITTEE ON DISCIPLINARY RULES

January 31, 2003

INTRODUCTION

The Oregon State Bar Board of Governors created the Special Legal Ethics Committee on Disciplinary Rules ("the Rules Committee") in August 2001, following the release of the final report of the American Bar Association's Ethics 2000 Commission (the E2K Commission). That report and its recommendations for amendments to the ABA Model Rules of Professional Conduct was the result of a comprehensive four-year study of the Model Rules, including hearings and the solicitation of comment from interested members of the bar, bench and public. Recognizing the importance of the E2K Commission's work, the Board of Governors charged the Rules Committee with making a comprehensive study of the Oregon Code of Professional Responsibility and suggesting amendments based on the E2K Commission recommendations.

The Rules Committee had its first meeting in October 2001, shortly after the ABA House of Delegates approved the first recommendations of the E2K Commission. In February 2002, the ABA House of Delegates completed its adoption of nearly all of the recommendations of the Ethics 2000 Commission; in August 2002, the ABA amended Model Rules 5.5 and 8.5 on the recommendations of its Commission on Multijurisdictional Practice. The Rules Committee monitored these developments as it continued its own study of the Oregon Code.

The Oregon Code was adopted in 1970, patterned after the ABA Model Code of Professional Responsibility. In 1983, the ABA replaced the entire Model Code with the Model Rules of Professional Conduct. By 1985, a large number of jurisdictions had followed suit. In 1985, the Oregon State Bar conducted a comprehensive review of the Oregon Code and in 1986 the Oregon Supreme Court adopted wide-ranging amendments, many of which incorporated concepts and actual language of the Model Rules. In the ensuing seventeen years, additional revisions have been made to the Oregon Code on an as-needed basis; many of those changes were also based on the Model Rules.

During that same seventeen year period, the practice of law has changed dramatically. Bar membership has more than quadrupled; new practice areas have emerged and others have faded; technology has altered the way in which lawyers communicate with each other and with clients; changing client expectations have reshaped the way legal services are delivered; and cross-border (multijurisdictional) practice is increasingly commonplace. The Board of Governors recognized that it was time for a thorough study of the adequacy of the Oregon Code to regulate lawyer conduct in the new century.

THE PROCESS

The Board of Governors appointed the Rules Committee from individuals then serving on the OSB Legal Ethics Committee.1 Rules Committee members brought a wide range of practice experience and expertise to the project.

The Rules Committee began its work with a general discussion of the development of the Oregon Code and the differences, perceived and real, between it and the ABA Model Rules. The Rules Committee also noted that by 2001, some version of the Model Rules has been adopted by the overwhelming majority of jurisdictions, including Oregon's "reciprocity partners," Washington and Idaho. The Rules Committee then identified and discussed the following reasons for and against replacing the Oregon Code with some version of the Model Rules.

Reasons for:

- Oregon is increasingly out of step with the majority of jurisdictions;
- Cross-border issues with our reciprocity partners will be easier to resolve if we all follow the same (or at least generally similar) rules;
- Having the Model Rules would give Oregon lawyers a larger base of analysis and authority, including the official comment and national resources focusing on the Model Rules;
- There are few significant distinctions between the Code and the Model Rules, so that a change would be principally in form rather than substance;
- An increasing number of members are familiar with the Model Rules and would likely not find a change unsettling;
- The "cut and paste" approach we have used in the past of engrafting parts of the Model Rules into the Code deprives us of whatever benefit there is from the overall structure of the Model Rules, including the preamble and scope provisions.

Reasons against:

- There is a perception that the Code is stricter and has a more client-protective approach;
- Our members are familiar with our rules;
- It is not clear that the Model Rules, either in format or structure, are clearer or easier to understand.

In spite of the relatively small number of reasons that could be identified for retaining the Oregon Code, the Rules Committee chose to approach its assignment initially with the philosophy of "if it ain't broke, don't fix it." At the same time, the Rules Committee recognized that "cutting and pasting" Model Rule language into the Oregon Code might create a confusing

1 Those appointed by the Board of Governors were Nancy Cooper (Chair), Lisanne Butterfield, Michael Caro, Ann Fisher, Mark Fucile, Susan Isaacs, John Junkin, Julie McFarlane, Arden Olson, Stephen Moore, Ulys Stapleton, and John Svoboda; some attrition occurred over the course of the project due to conflicting obligations. Staff support was provided by OSB Assistant General Counsel Sylvia E. Stevens.

end product. Nevertheless, the Rules Committee made a deliberate choice to reserve until later in its review process a decision about whether to recommend a shift to the Model Rules.

Beginning with DR 1-101, the Rules Committee compared each provision of the Oregon Code with its analogous Model Rule, adopting the Model Rule language where it appeared to be clearer and easier to understand and follow, but retaining the Oregon Code provision where no compelling reason for change was identified. After reviewing all of the DRs, the committee then looked at Model Rules that have no counterpart in the Oregon Code and determined that several of those rules should be added to the Oregon Code. The resulting draft was an amalgam in Model Code format of rules from Model Code and the Model Rules, together with Oregon's own distinct rules.

The Rules Committee then returned to its consideration of whether Oregon should adhere to its Code-based rules and Model Code format or replace the Oregon Code with rules patterned on the Model Rules. After consideration, there was agreement that trying to incorporate more of the Model Rules concepts into the Oregon Code created a product that was cumbersome to follow and difficult to correlate to the Model Rules, making reliance on the Comment and other authorities more difficult.

Three developments that occurred during the Rules Committee's review process reinforced the view that Oregon should join the steady march toward the ABA Model Rules. First, Oregon was invited to join Washington and Idaho in a joint study looking at making the disciplinary rules of the three jurisdictions more uniform. Because Washington and Idaho are Model Rules jurisdictions, the Rules Committee concluded that increasing uniformity is likely to require more change by Oregon than its reciprocity partners. Second, the House of Delegates adopted recommendations of the Disciplinary System Task Force which included a directive that the Oregon Code be studied for ways to make it simpler and clearer. The Rules Committee believed that goal would be advanced in part by adoption of the same rules followed by the great majority of jurisdictions, thereby increasing the body of authority available for interpretive guidance. Finally, the Rules Committee noted that Tennessee recently became the 44th jurisdiction to adopt a version of the Model Rules in place of its Code-based rules, and that New York is conducting a review of its Code. If, as is anticipated, New York replaces its Code with a version of the Model Rules, Oregon will be one of only five jurisdictions2 retaining the old Model Code structure.

The Rules Committee concluded that Oregon needs to be in the mainstream of American legal ethics and that its lawyers should enjoy the benefits of a national body of case law and authority for guidance on professional conduct. This cannot be accomplished by retaining the Code-based rules merely because they are familiar, or because they are perceived to be "better" than the Model Rules, or because we cherish the reputation for doing things differently in Oregon.

On that premise, the Rules Committee undertook a second review of the disciplinary rules, this time working through the Model Rules and comparing them with their analogous Oregon Code provisions. In so doing, the Rules Committee was guided by three occasionally competing values: uniformity; retention of those aspects of the rules that are unique to Oregon or special in some other way; and having the best written rule. Attempting to achieve uniformity

2 Iowa, Maine, Nebraska and Ohio follow versions of the Model Code; California follows neither the Model Code or the Model Rules format.

generally meant following the ABA Model Rule language unless there was a compelling reason to retain the language of the Oregon Code. Compelling reason was found where a rule had been adopted or amended relatively recently after considerable study (i.e., DR 1-102(D) and DR 5-106), or where the Rules Committee believed that the Oregon rule was better-written or offered clearer guidance. The Rules Committee endeavored to avoid following the Model Rules slavishly, while also not departing from them lightly. The Rules Committee's recommendation does not include adoption of the official Comment to the Model Rules at this time. Nevertheless, it is the intention of the Rules Committee that the Comment be a recognized interpretive guide.

This report includes a Summary of Significant Changes, the *Proposed* Oregon Rules of Professional Conduct with the Rules Committee's explanatory notes following each proposed rule, and a Comparison Table. A "redline" version of the Proposed ORPC is also provided.

CONCLUSION

The Rules Committee presents this report and its recommendation for adoption of the Oregon Code of Professional Responsibility with confidence that it is the right thing for Oregon lawyers and their clients. The Rules Committee has given each of its recommendations serious and lengthy consideration and has attempted to bring as much variety of opinion to the analysis as possible.

At the same time, the Rules Committee recognizes that this is a large volume of information for the Board of Governors, the membership, the House of Delegates and the Supreme Court to absorb and that the entire proposal may be met with considerable initial suspicion or antipathy. Accordingly, the Rules Committee respectfully suggests that the Board of Governors publish this report and recommendation widely and authorize the Rules Committee to hold hearings around the state to solicit input and comment from, with a view toward allowing the widest possible discussion of these proposed Rules. The Rules Committee also requests that the comment period be structured so that the Rules Committee will have adequate time to fully consider the comments submitted and develop alternate suggestions as appropriate before the proposal is submitted to the House of Delegates.

Finally, the members of the Rules Committee express their appreciation to the Board of Governors for the opportunity to participate in this challenging and important project.

SUMMARY OF SIGNIFICANT CHANGES

1. Style and Format
The most obvious change that will result from adoption of the Rules Committee's proposal is in the "look" of the rules and in the name change from Disciplinary Rules to Rules of Professional Conduct. The proposed ORPC follows the Model Rule numbering style of "X.X" rather than the Code style of "X-X0X." Also, the rules are set forth in different order and compiled in sections related to the role of the lawyer ("Counselor") rather than the nature of the prohibited conduct ("Unlawful Practice of Law").

2. Preamble and Scope
The Oregon Code has no equivalent to the preamble and scope provisions, which are not binding, but serve to explain the overall theory and structure of the rules and express aspirational standards.

3. Duty of Confidentiality
The proposed rule is taken from the Model Rule 1.6, which requires protection of "information relating to the representation of a client" and does not distinguish between privileged information ("confidences") and other information that would be embarrassing or prejudicial to the client if disclosed ("secrets"). The proposed ORPC includes a definition of "information relating to the representation of a client" that incorporates the Code concepts of confidences and secrets to ensure that the protection of client information is the same as under the Oregon Code.

4. Conflicts of Interest

The proposed ORPC offers a different analytical approach to conflicts of interest, although the Rules Committee is satisfied that the outcomes are the same under either set of rules. In other words, there are no conflict situations that would be permitted under the ORPC that are not permitted under the Oregon Code. At the same time, the Rules Committee believes that the Model Rule approach to conflict analysis is clearer and easier for practitioners to understand and follow than the existing Oregon conflict rules.

Multiple current client conflicts and the lawyer "self-interest" conflicts are governed by Rule 1.7, which permits the simultaneous representation if the clients consent and if the lawyer "reasonably believes" that the lawyer can provide competent and diligent representation to each client. While this aspect was implicit in the Oregon Code, the Rules Committee favors making it express. Former client conflicts are addressed in 1.9, and Rule 1.8 incorporates ten specific "self-interest" conflict situations involving current clients that were found in various places in the Oregon Code.

The proposed ORPC also contains special conflict rules for government lawyers and for former judges and third-party neutrals, which the Rules Committee believes will offer clearer guidance to lawyers in those special situations and clarify what has been ambiguous in some respects.

5. Informed Consent
The proposed ORPC substitutes the concept of "informed consent" for "consent after full disclosure." The definition of informed consent refers to "adequate information and explanation about the material risks" and "reasonably available alternatives" to the proposed course of conduct, which the Rules Committee believes is virtually indistinguishable from what is intended by "full disclosure" in the Oregon Code and as it has been interpreted by the Supreme Court.

6. Trial Publicity
The Model Rule on trial publicity, which is incorporated into the proposed ORPC, is more detailed and provides clearer guidance about the kinds of statements that are permitted.

7. Responsibilities of a Prosecutor
The proposed ORPC contains the Model Rule on prosecutor conduct, which is more detailed and offers better guidance about permitted conduct.

8. Unauthorized Practice of Law
The proposed ORPC incorporates the new Model Rule 5.5, which contains very specific guidelines about the circumstances under which an out-of-state lawyer can engage in the practice of law in Oregon.

9. Choice of Law
The proposed ORPC includes the Model Rule on choice of law. Currently, choice of law is covered by BR 1.4 , which was based on the former Model Rule 8.4. The Rules Committee believes this rule needs to be part of the ORPC so that it is easily noticed and referenced by practitioners, and also because it is increasingly relevant to multi-state practice issues.

10. New Provisions
The proposed ORPC contains a number of provisions from the ABA Model Rules that have no counterpart in the Oregon Code. In addition to a more expansive terminology rule, there are new provisions that:

- allow for limited-scope representations (Rule 1.2),
- require communication with the client (Rule 1.4),
- allow disclosure of client information to obtain advice about ethical conduct (Rule 1.6(b)(3)),
- govern the obligations of lawyers representing organizations (Rule 1.13),
- clarify the obligations of a lawyer representing a client with diminished capacity (Rule 1.14),
- address the duties of a lawyer to a prospective client (Rule 1.18),
- require a lawyer to make reasonable efforts to expedite litigation (Rule 3.2),
- in ex parte proceedings, require disclosure to the tribunal of all material facts (Rule 3.3(d)),
- require notice to the sender of an inadvertently sent document (Rule 4.4(b)),
- require law firms to establish measures to assure that all firm members comply with the ORPC (Rule 5.1),
- require lawyer to establish measures to assure that the conduct of nonlawyer assistants is compatible with the obligations of lawyers under the ORPC (Rule 5.3),
- encourage public interest legal service (Rule 6.1),
- limit the conflict risks that discourage representation of clients through nonprofit legal service programs (Rule 6.5), and
- require lawyers to report judicial misconduct (Rule 8.3).

- **Comparison Table**

Oregon Code of Professional Responsibility to *Oregon Rules of Professional Conduct*

DR 1-101	Rule 8.1
DR 1-102(A)(1)	Rule 8.4(a)(1)
DR 1-102(A)(2)	Rule 8.4(a)(2)
DR 1-102(A)(3)	Rule 8.4(a)(3)
DR 1-102(A)(4)	Rule 8.4(a)(4)
DR 1-102(A)(5)	Rule 7.1(a)(5)
DR 1-102(B)(1)	Rule 5.1(c)(1)
DR 1-102(B)(2)	Rule 5.1(c)(2)
DR 1-102(C)	Rule 5.2(a)
DR 1-102(D)	Rule 8.4(b)
DR 1-103(A)	Rule 8.3(a)
DR 1-103(B)	Rule 8.3(b)
DR 1-103(C)	Rule 8.3(c)
DR 1-103(D)	Rule 8.3(d)
DR 1-103(E)	Rule 8.3(e)
DR 1-103(F)	Rule 8.3(f)
DR 1-104	eliminated
DR 1-105	Rule 8.6
DR 2-101(A)(1)	Rule 7.1(a)(1)
DR 2-101(A)(2)	Rule 7.1(a)(2)
DR 2-101(A)(3)	Rule 7.1(a)(3)
DR 2-101(A)(4)	Rule 7.1(a)(4)
DR 2-101(A)(5)	eliminated
DR 2-101(A)(6)	Rule 7.1(a)(6)
DR 2-101(A)(7)	Rule 7.1(a)(7)
DR 2-101(A)(8)	Rule 7.1(a)(8)
DR 2-101(A)(9)	Rule 7.1(a)(9)
DR 2-101(A)(10)	Rule 7.1(a)(10)
DR 2-101(A)(11)	Rule 7.1(a)(11)
DR 2-101(A)(12)	Rule 7.1(a)(12)
DR 2-101(B)	eliminated
DR 2-101(C)	Rule 7.1(b)
DR 2-101(D)	Rule 7.3(b)
DR 2-101(E)	Rule 7.1(c)
DR 2-101(F)	Rule 7.1(d)

DR 2-101(G)	Rule 7.1(e)
DR 2-101(H)	Rule 7.3(c)
DR 2-102(A)	Rule 7.5(a)
DR 2-102(B)	Rule 7.5(b)
DR 2-102(C)	Rule 7.5(c)
DR 2-102(D)	Rule 7.5(d)
DR 2-102(E)	Rule 7.5(e)
DR 2-102(F)	Rule 7.5(f)
DR 2-103(A)	Rule 7.2(a)
DR 2-103(B)	Rule 7.2(b)
DR 2-103(C)	Rule 7.2(c)
DR 2-104(A)(1)	Rule 7.3(a)
DR 2-104(A)(2)	Rule 7.3(a)
DR 2-104(A)(3)	Rule 7.3(d)?
DR 2-104(B)	Rule 7.3(a)
DR 2-105	Rule 5.4(e)
DR 2-106(A)	Rule 1.5(a)
DR 2-106(B)	Rule 1.5(b)
DR 2-106(C)	Rule 1.5(c)
DR 2-107(A)	Rule 1.5(d)
DR 2-107(B)	Rule 1.5(e)
DR 2-108	Rule 5.6
DR 2-109(A)	Rule 3.4(a)
DR 2-109(B)	Rule 3.4(f)
DR 2-109(C)	Rule 3.1
DR 2-110	Rule 1.16
DR 2-111	Rule 1.17
DR 3-101(A)	Rule 5.5(a)
DR 3-101(B)	Rule 5.5(a)
DR 3-102	Rule 5.4(a)
DR 3-103	Rule 5.4(b)

DR 4-101(A)-(C)	Rule 1.6(a)-(b)
DR 4-101(D)	Rule 5.3(b)
DR 5-101(A)	Rule 1.7(a)(2)
DR 5-101(A)(1)	Rule 1.7(c)(3)
DR 5-101(B)	Rule 1.8(c)
DR 5-102	Rule 3.7
DR 5-103(A)	Rule 1.8(l)
DR 5-103(B)	Rule 1.8(e)
DR 5-104(A)	Rule 1.8(a)
DR 5-104(B)	Rule 1.8(d)
DR 5-105(A)(1)	Rule 1.7(b)(3)
DR 5-105(A)(2)	Rule 1.7(a)(2)
DR 5-105(A)(3)	Rule 1.7(a)(2)
DR 5-105(B)	Rule 1.0(i)
DR 5-105(C)	Rule 1.9(a)
DR 5-105(D)	Rule 1.9(a)
DR 5-105(E)	Rule 1.7(a)
DR 5-105(F)	Rule 1.7(b)
DR 5-105(G)	Rule 1.8(k)
DR 5-105(H)	Rule 1.9(b)
DR 5-105(I)	Rule 1.10(c)
DR 5-105(J)	Rule 1.10(b)
DR 5-106	Rule 2.4
DR 5-107	Rule 1.8(g)
DR 5-108(A)	Rule 1.8(f)
DR 5-108(B)	Rule 5.4(c)
DR 5-109(A)	Rule 1.12(a)
DR 5-109(B)	Rule 1.11(a)
DR 5-110	Rule 1.8(j)
DR 6-101(A)	Rule 1.1
DR 6-101(B)	Rule 1.3
DR 6-102(A)	Rule 1.8(h)(1)-(2)
DR 6-102(B)	Rule 1.8(h)(3)

DR 7-101(A)	Rule 1.2(a)
DR 7-101(B)	eliminated
DR 7-101(C)	Rule 1.14
DR 7-101(D)	Rule 2.3
DR 7-102(A)(1)	Rule 3.1
DR 7-102(A)(2)	Rule 3.1
DR 7-102(A)(3)	Rule 3.3(a)(4)
DR 7-102(A)(4)	Rule 3.3(a)(3)
DR 7-102(A)(5)	Rule 3.3(a)(1)
DR 7-102(A)(6)	Rule 3.4(a)
DR 7-102(A)(7)	Rule 3.4(a)
DR 7-102(A)(8)	eliminated
DR 7-102(B)(1)	Rule 3.3(a)(3) & 3.3(b)
DR 7-102(B)(2)	Rule 3.3(b)
DR 7-103	Rule 3.8
DR 7-104(A)(1)	Rule 4.2
DR 7-104(A)(2)	Rule 4.3
DR 7-105	Rule 3.4(g)
DR 7-106(A)	Rule 3.4(c)
DR 7-106(B)(1)	Rule 3.3(a)(2)
DR 7-106(B)(2)	eliminated
DR 7-106(C)(1)	Rule 3.4(e)
DR 7-106(C)(2)	eliminated
DR 7-106(C)(3)	Rule 3.4(e)
DR 7-106(C)(4)	Rule 3.4(e)
DR 7-106(C)(5)	eliminated
DR 7-106(C)(6)	Rule 3.5(d)
DR 7-106(C)(7)	Rule 3.4(c)
DR 7-107(A)	Rule 3.6(a)
DR 7-107(B)	Rule 3.6(b)
DR 7-107(C)	Rule 3.6(c)
DR 7-108(A)	Rule 3.5(a)
DR 7-108(B)	Rule 3.5(b)
DR 7-108(C)	Rule 3.5(b)
DR 7-108(D)	Rule 3.5(c)

DR 7-108(E)	Rule 3.5(c)
DR 7-108(F)	Rule 3.5(c)
DR 7-108(G)	Rule 3.5(e)
DR 7-109	Rule 3.4(b)
DR 7-110	Rule 3.5(b)
DR 8-101(A)(1)	Rule 1.11(c) & (d)(i)
DR 8-101(A)(2)	Rule 1.11(d)(ii)
DR 8-101(A)(3)	Rule 1.11(d)(iii)
DR 8-101(A)(4)	Rule 1.11(c) & (d)(iv)
DR 8-101(B)	eliminated
DR 8-101(C)	Rule 1.11(e)
DR 8-101(D)	Rule 1.11(f)
DR 8-102	Rule 8.2
DR 8-103	Rule 8.2(b)
DR 9-101(A)-(C)	Rule 1.15(a)-(e)
DR 9-101(D)(1)	Rule 1.15(a)
DR 9-101(D)(2)-(4)	Rule 1.15((f)-(h)
DR 9-102	Rule 1.15(i)-(m)
DR 10-101	Rule 1.0